BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VERDENE PAGE,	)	
	)	
Claimant,	)	
v.	)	**IC 02-007246**
	)	
McCAIN FOODS, INC.,	)	
	)	**FINDINGS, CONCLUSIONS, AND**
Employer,	)	**ORDER ON REMAND**
and	)	
	)	
TRANSCONTINENTAL	)	
INSURANCE COMPANY,	)	Filed June 14, 2005
	)	
Surety,	)	
Defendants.	)	
_____	)	

On February 17, 2005, the Idaho Supreme Court issued an opinion in the above-referenced case. At issue was (1) whether Claimant gave proper notice of her accident or Employer had sufficient knowledge of the injury and (2) whether standing from a seated position constitutes an "accident" under the Idaho Workers' Compensation Law. The Court determined the Commission erred in concluding (1) that Claimant's claim for benefits was barred by her failure to give proper notice to Employer and (2) that Claimant did not experience an "accident." The case was remanded for further proceedings based on the conclusions of the Court.

ISSUES

The issues were identified at the original hearing as:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

2. Whether Claimant has suffered an injury caused by an accident arising out of and in the course of employment;

3. Causation;

4. Whether and to what extent Claimant is entitled to the following benefits:

(a) temporary partial or temporary total disability benefits (TPD/TTD),

(b) permanent partial impairment (PPI),

(c) disability in excess of impairment (PPD),

(d) medical care, and

(e) attorney fees;

5. Whether Claimant is entitled to permanent and total disability pursuant to the odd-lot doctrine; and

6. Apportionment.

FINDINGS OF FACT

The Findings of Fact set forth in the Commission decision issued on December 8, 2003, regarding the above-referenced case are incorporated by reference. Additional findings regarding Claimant's treatment and condition are necessary for full resolution of the noticed issues. The additional findings are set forth below.

1. On October 8, 2001, Claimant first visited Joseph Petersen, M.D. She reported having knee pain for "about 6-7 months" which had been "slowly increasing." He examined Claimant's knee and ordered another MRI. On October 15, 2001, in addition to the degenerative changes, the MRI showed a complex tear of the medial meniscus.

2. On October 25, 2001, Dr. Petersen performed arthroscopic surgery. Claimant began recovery. On November 8, 2001, Dr. Petersen noted, "the problem is that we are getting into

problems with narcotics on her. She was sent to us from Dr. Hicks's office with problems. She still has the problems. She is eating Vicodin at 2 every 3 hours around the clock which is way over her limits." Claimant failed to show for her next follow-up visit on November 26, 2001, and Dr. Petersen rated her stable. He did not see her again until Spring 2003. On March 27, 2003, Dr. Petersen noted, "At the time of the catch she did have a meniscus that was torn in there. The osteochondral damage was hers by all rights. She has developed this through the years. But, the meniscus may have very easily been a Workmen' [sic] Comp." He also noted she reported she still needed Vicodin. He "guaranteed" she would eventually require a total knee replacement. An April 18, 2003, MRI showed further degeneration of her lumbar spine.

3. In deposition, Dr. Petersen opined that given the described history, Claimant's meniscus probably tore at work. He continued, "it could have torn anyplace with the condition of her knee. So just the fact that she was at work was fortuitous." He opined Claimant employable only in sedentary positions. He opined bilateral degenerative arthritis in her knees preexisted the injury, as did her bad back and poor general health.

4. Claimant resumed treatment with Dr. Hicks on November 14, 2001, when he admitted her to the hospital for an overnight stay following a panic attack. His diagnoses included panic attack, depression, and chronic low back pain secondary to degenerative joint disease of the lumbar spine.

5. Dr. Hicks continued to treat Claimant for her various conditions during 2002. On October 17, 2002, he noted, "I don't see how she can re-enter the work force. She is stable." His March 10, 2003, diagnosis was degenerative joint disease with chronic myofascial pain. In deposition he opined, "I believe she is no longer capable of being gainfully employed." He further opined:

> She in the course of her employment that evening, and because she had arthritis, has set up an inflammatory condition. While she was moving about, the fluids were able to be moved through the body, through the lymphatic system. When she sat down that first time, I believed she hyperflexed her leg and placed the meniscus in an awkward position, which for us without arthritis would have been no big deal. Then, I believe, that she started to get up with the meniscus partially malpositioned, put pressure on it between the two long bones of the leg and that is when she began to feel pain the first time. I think she was able to rub and move the lymphatic fluids along and ease up some of that swelling, went back to her routine of duties, but had now predisposed it. When she sat down again, I think she once again put her legs back like this, hyperflexed it. When she started to get up, she now tore it. I think once it was torn and she wasn't moving it, it was hurting so much.

CONCLUSIONS

Notice. Neither party disputes the fact that Claimant did not provide proper *written* notice to Employer regarding her accident and injury. However, the Court determined that "Page testified that she told her supervisor that her knee had locked up when she attempted to stand from a seated position at a table where she was engaged in a duty of her employment. This provided the supervisor with knowledge of the injury and the source of the injury." Because Defendants possessed actual knowledge of the injury, Claimant's failure to provide proper written notice is not a bar to her claim for workers' compensation benefits. Idaho Code § 72-704.

Accident. An "accident" is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred. Idaho Code § 72-102(17)(b). Claimant experienced an accident when she arose from her chair and felt "grabbing" and "horrible, grinding pain." *See*, Spivey v. Novartis Seed, Inc., 137 Idaho 29, 43 P.3d 788 (2002).

Causation. Claimant bears the burden of showing the accident caused the condition for which he or she seeks benefits. Cole v. Stokely Van Camp, 118 Idaho 173, 795 P.2d 872 (1990). On March 27, 2003, Dr. Petersen noted, "the meniscus may have very easily been a Workmen'

Comp [sic]." Dr. Hicks opined Claimant's arthritis set up an inflammatory condition that, when Claimant moved to stand partially malpositioned the meniscus, and caused it to tear. Both doctors opined Claimant tore her medial meniscus sufficiently for it to become symptomatic in one or both of the events at work on August 17, 2001.

Additionally, on remand the Court noted:

> The testimony of two physicians establishes that while the meniscus tear could have happened at any time, based on the 'grabbing,' pain and locking of the knee, the probability is that it happened at the time Page rose from the chair. Case law holds that doubts about an injury arising out of and in the course of employment are resolved in favor of the claimant. [Internal citation omitted.] Additionally, it is correct that prior to the date of injury Page had sought medical treatment for leg and back pain. The Commission made two findings on the prior treatment. Finding No. 3 states that Page sought treatment at a hospital in March 2001. However, the medical records did not disclose the location of the pain. Finding No. 4 states that subsequent treatment by a chiropractor focused on Page's left shin and right leg, but not her left knee. . . . Both of these findings are supported by the record.

Hence, the weight of medical opinion shows it probable that Claimant's torn left medial meniscus occurred when she rose from a sitting position on August 17, 2001.

TPD/TTD benefits. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on the claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

As a result of Claimant's work injury, Dr. Petersen performed arthroscopic surgery on October 25, 2001. After Claimant failed to show for a follow-up appointment on November 26, 2001, he opined she was stable. Dr. Petersen testified that although Claimant's meniscus probably tore at work, her bilateral degenerative arthritis in the knees pre-existed the industrial injury, as did her bad back and poor general health. Therefore, Claimant was in a period of recovery from August

18, 2001 through November 26, 2001.

Medical care. Claimant is entitled to medical care benefits for her knee injury through November 26, 2001, her date of medical stability. Medical care thereafter was the result of other conditions not related to the accident at work.

PPI benefits. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. An "evaluation of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989).

In response to a records request made by Claimant's counsel in March 2003, Dr. Petersen noted in Claimant's chart that her torn meniscus "does have an impairment rating to it." In addition, Drs. Hicks and Petersen document Claimant's complaints of continuing knee pain. Based on Dr. Petersen's assessment that impairment exists and Claimant's ongoing complaints of pain, the Commission finds Claimant has suffered 1% whole person PPI.

Disability and apportionment. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no functional or marked change in the future can be reasonably expected. Idaho Code § 72-423. An "evaluation of permanent disability" is an appraisal of the claimant's present and probable future ability to engage in gainful activity as it is affected by the

medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425.

The burden of proof is on the claimant to prove the existence of any disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986). The test for such determination is not whether the claimant is able to work at some employment, but whether the physical impairment, taken with non-medical factors, has reduced the claimant's capacity for gainful activity. Account should be taken of the nature of the physical disablement, disfigurement, the cumulative effect of multiple injuries, the occupation of the employee, his or her age at the time of the accident, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. Idaho Code § 72-430(1).

Idaho Code § 72-406 (1) provides in pertinent part that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Claimant is a 61 year old woman who has not received any training or formal education since obtaining her GED in 1965. Outside of her work for Employer, she has held one other job during her lifetime. Dr. Petersen opined Claimant is now limited to sedentary work. Drs. Hicks and Tyler indicated Claimant should avoid kneeling, squatting, crawling, lifting and carrying weight in excess of 20 pounds, as well as standing or walking on uneven surfaces. These restrictions relate to her repaired medial meniscus and Claimant's degenerative back and knee conditions. It is clear that the combination of Claimant's medical and non-medical factors has resulted in a partial loss of access to

the job market.

The amount of permanent disability apportionable to this claim is not specifically quantified by any testimony of record. Were it properly rated, the majority of Claimant's permanent impairment from all physical conditions would be related to pre-existing conditions and not to the subject accident. As a result, Claimant's pre-existing impairment significantly contributed to her degree of disability. The Commission finds Claimant suffers a five percent (5%) permanent partial disability as a result of the subject accident, which includes her 1% PPI.

Odd-lot. Claimant failed to show her permanent disability is total or that she satisfied the criteria for odd-lot status.

Attorney fees. Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code §72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

Considering the lack of written notice, the equivocal medical records, and the procedural posture of this case, Defendants' actions in denying the claim were not unreasonable. For the same reasons, attorney fees based on Claimant's appeal are also denied.

* * * * *

ORDER

1. Because Claimant provided immediate oral notice of the accident her failure to provide proper written notice is not a bar to her claim for compensation.

2. Claimant suffered an accident arising out of and in the course of employment.

3. Claimant suffered an injury caused by that accident, specifically, a torn medial meniscus in her left knee.

4. Claimant is entitled to TTD benefits from August 18 through November 26, 2001.

5. Claimant is entitled to benefits for all related medical care from the date of accident through November 26, 2001.

6. Claimant is entitled to 1% whole person PPI, as a result of the August 17, 2001, industrial accident.

7. Claimant is entitled to 5% PPD, inclusive of PPI, as a result of the August 17, 2001, industrial accident.

8. Claimant failed to prove she is an odd-lot worker.

9. Claimant failed to prove she is entitled to attorney fees.

DATED this *14th* _day of __June_____, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
James F. Kile, Commissioner

__/s/_____
R.D. Maynard, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __14 day of __June_____, 2005, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS, AND ORDER ON REMAND** was served by regular United States Mail upon each of the following:

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kas ____/s/_____